



June 20, 2002

Ms. Doreen L. Wheeler
Assistant General Counsel
Office of Consumer Credit Commissioner
2601 North Lamar Boulevard
Austin, Texas 78705

OR2002-3358

Dear Ms. Wheeler:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 163963.

The Office of the Consumer Credit Commissioner (the "OCCC") received a request for information about banks that make payday loans. You state that you received the written request on December 17, 2001, and you then requested a decision from this office pursuant to section 552.301 of the Government Code on January 4, 2001. In response to your request, this office issued Open Records Letter Ruling No. 2002-1277 (2002) on March 15, 2002. You state that subsequent to our ruling, you discovered additional information relating to a third company, First Cash Financial Services, Inc. ("First Cash"), that is responsive to the initial request. You submitted this information and your arguments for why it should be excepted from public disclosure to this office on April 3, 2002. You inform us, and provide documentation showing, that you notified First Cash of the request for information and of its right to submit arguments to this office regarding the confidentiality of the information. *See Gov't Code § 552.305(d); see also Open Records Decision No. 542 (1990) (determining that statutory predecessor to § 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception to disclosure under Public Information Act in certain circumstances).* You claim that the additional information may implicate the property interests of First Cash, and that portions of the information are excepted from disclosure under sections 552.101 and 552.136 of the Government Code. In its comments to this office, First Cash claims the information is excepted from disclosure under section 552.110 of the Government Code. We have considered your comments and the comments provided by First Cash, and reviewed the submitted information.

Initially, we must address the timeliness of your request for a decision regarding this additional information. You acknowledge that you have failed to request a ruling with regard to the information pertaining to First Cash within the ten-day deadline provided under section 552.301. You contend, however, that the exceptions you raise and the interests of a third party provide a compelling reason to withhold the information from disclosure. *See* Gov't Code §§ 552.301, .302 (failure to timely submit specific information requested for attorney general review results in the legal presumption that the information is public and must be released, unless a governmental body demonstrates a compelling reason to withhold the information); *see also* Open Records Decision Nos. 630 (1994) (presumption of openness overcome by a showing that the information is made confidential by another source of law or affects third party interests), 319 (1982) (statutory predecessor to section 552.110 provides a compelling reason to overcome presumption of openness). We will therefore address the exceptions you raise, and the argument submitted by First Cash.

Section 552.110 protects: (1) trade secrets, and (2) commercial or financial information the disclosure of which would cause substantial competitive harm to the person from whom the information was obtained. *See* Gov't Code § 552.110(a), (b). Section 552.110(a) protects the property interests of private parties by excepting from disclosure trade secrets obtained from a person and privileged or confidential by statute or judicial decision. *See* Gov't Code § 552.110(a). A "trade secret"

may consist of any formula, pattern, device or compilation of information which is used in one's business, and which gives [one] an opportunity to obtain an advantage over competitors who do not know or use it. It may be a formula for a chemical compound, a process of manufacturing, treating or preserving materials, a pattern for a machine or other device, or a list of customers. It differs from other secret information in a business in that it is not simply information as to single or ephemeral events in the conduct of the business, as for example the amount or other terms of a secret bid for a contract or the salary of certain employees. . . . A trade secret is a process or device for continuous use in the operation of the business. Generally it relates to the production of goods, as for example, a machine or formula for the production of an article. It may, however, relate to the sale of goods or to other operations in the business, such as a code for determining discounts, rebates or other concessions in a price list or catalogue, or a list of specialized customers, or a method of bookkeeping or other office management.

RESTATEMENT OF TORTS § 757 cmt. b (1939); *see also* *Hyde Corp. v. Huffines*, 314 S.W.2d 763, 776 (Tex. 1958); Open Records Decision Nos. 255 (1980), 232 (1979), 217 (1978).

There are six factors to be assessed in determining whether information qualifies as a trade secret:

- (1) the extent to which the information is known outside of [the company's] business;
- (2) the extent to which it is known by employees and others involved in [the company's] business;
- (3) the extent of measures taken by [the company] to guard the secrecy of the information;
- (4) the value of the information to [the company] and to [its] competitors;
- (5) the amount of effort or money expended by [the company] in developing this information; and
- (6) the ease or difficulty with which the information could be properly acquired or duplicated by others.

RESTATEMENT OF TORTS § 757 cmt. b (1939); *see also* Open Records Decision No. 232 (1979). This office must accept a claim that information subject to the Public Information Act (the "Act") is excepted as a trade secret if a *prima facie* case for exemption is made and no argument is submitted that rebuts the claim as a matter of law. Open Records Decision No. 552 (1990). However, we cannot conclude that section 552.110(a) is applicable unless it has been shown that the information meets the definition of a trade secret and the necessary factors have been demonstrated to establish a trade secret claim. Open Records Decision No. 402 (1983).

Section 552.110(b) protects "[c]ommercial or financial information for which it is demonstrated based on specific factual evidence that disclosure would cause substantial competitive harm to the person from whom the information was obtained[.]" - Gov't Code § 552.110(b). This exception to disclosure requires a specific factual or evidentiary showing, not conclusory or generalized allegations, that substantial competitive injury would likely result from release of the information at issue. Gov't Code § 552.110(b); *see also National Parks & Conservation Ass'n v. Morton*, 498 F.2d 765 (D.C. Cir. 1974); Open Records Decision No. 661 (1999).

First Cash states that the submitted documents, consisting of correspondence between First Cash and the OCCC, documents used in payday loan transactions, and a training manual, describe an integrated system that "interwoven together constitute a proprietary process or business plan" within the scope of section 552.110. First Cash asserts that the information in the submitted documents is not generally known outside the company and that access to the information within the company is restricted to a limited number of employees. First Cash also asserts that the information is of great value to the company, developed at great expense, and could not be acquired or duplicated by others without disclosure. From our review, however, it appears that attachments F through P are all samples of documents that

First Cash would provide to members of the public in the course of conducting its payday loan business. In particular, these documents consist of a brochure providing information to customers about First Cash's payday loan business, blank loan applications and assignment agreements, notices of terms and conditions, Truth-in-Lending Act disclosure statements, and Notice of Action Taken/Statement of Credit Denial forms. Attachments B through E represent the responses of First Cash to questions posed by the OCCC, the state agency with regulatory authority over First Cash's business. We find that the First Cash loan documents and the contents of the correspondence with the OCCC cannot constitute trade secrets for purposes of section 552.110(a). Although First Cash states that competitive harm would result from disclosure of the loan documents or the correspondence, we find that First Cash has not provided a specific factual or evidentiary showing of the likelihood of substantial competitive injury from such disclosure. Thus, we determine that the information in attachments B through P cannot be withheld under section 552.110 of the Government Code.

First Cash also asserts that the training manual, submitted as attachment Q, is excepted from public disclosure under section 552.110. First Cash states that the training manual is not known outside of First Cash's business and is unique to its relationship with the bank originating the payday loans. Furthermore, First Cash states that only those employees involved with the payday loan program have access to the training manual. First Cash states that significant amounts of money and time were spent developing the manual, making the manual of significant value to First Cash's competitors who could use it to arrange their own procedures without incurring the same development costs. First Cash also represents that the confidentiality of the training manual is protected so that the manual may not be easily acquired or duplicated by others. Based on First Cash's representations and our review, we find that First Cash has shown that the training manual does meet the definition of a trade secret and has demonstrated the necessary factors to establish a trade secret claim. *See Open Records Decision No. 402 (1983)*. Accordingly, we determine that the training manual must be withheld pursuant to section 552.110(a).

The OCCC claims that the submitted loan documents contain personal financial information that is excepted from disclosure under section 552.101 of the Government Code. Section 552.101 excepts "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Section 552.101 also encompasses the doctrine of common-law privacy. Common-law privacy protects information if (1) the information contains highly intimate or embarrassing facts the publication of which would be highly objectionable to a reasonable person, and (2) the information is not of legitimate concern to the public. *Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). In this instance, you claim that the loan documents contain private financial information, but you believe that at least some of the loan documents are fictitious. Upon review, we have marked the personal financial information that, if not fictitious, must be withheld under section 552.101. *See generally Open Records Decision Nos. 545 (1990)* (common-law privacy protects personal financial information not relating to a financial transaction between an individual and a governmental

body), 523 (1989) (common-law privacy protects credit reports, financial statements, and other personal financial information), 373 (1983) (common-law privacy protects assets and income source information).

We also note that the submitted information contains account numbers. Section 552.136 of the Government Code makes certain account numbers confidential. It provides in relevant part:

Sec. 552.136. CONFIDENTIALITY OF CREDIT CARD, DEBIT CARD, CHARGE CARD, AND ACCESS DEVICE NUMBERS.

(a) In this section, "access device" means a card, plate, code, account number, personal identification number, electronic serial number, mobile identification number, or other telecommunications service, equipment, or instrument identifier or means of account access that alone or in conjunction with another access device may be used to:

- (1) obtain money, goods, services, or another thing of value; or
- (2) initiate a transfer of funds other than a transfer originated solely by paper instrument.

(b) Notwithstanding any other provision of this chapter, a credit card, debit card, charge card, or access device number that is collected, assembled, or maintained by or for a governmental body is confidential.

Thus, we determine that you must withhold the account numbers we have marked under section 552.136, unless the account numbers are fictitious.

You have also indicated that the submitted documents contain a social security number. Social security numbers may be withheld in some circumstances under section 552.101 of the Government Code in conjunction with the 1990 amendments to the federal Social Security Act, 42 U.S.C. § 405(c)(2)(C)(viii)(I). *See* Open Records Decision No. 622 (1994). These amendments make confidential social security numbers and related records that are obtained and maintained by a state agency or political subdivision of the state pursuant to any provision of law enacted on or after October 1, 1990. *See id.* You represent that the OCCC obtained this social security number pursuant to its authority under section 342.007 of the Finance Code. Section 342.007 requires the OCCC to adopt rules for the regulation of payday loans, identified as "deferred presentment transactions" in the statute. Section 342.001 of the Finance Code provides that deferred presentment transactions are "loans" within the scope of the OCCC's regulatory authority. Upon review, we find that the pertinent provisions of the Finance Code do not address the obtaining or maintaining of social security numbers by the OCCC in the course of its regulatory duties. *See* Fin. Code §§ 341.001, 342.005, 342.007. Therefore, we have no basis for determining that the social

security number in the file is confidential under section 405(c)(2)(C)(viii)(I), and thus excepted from public disclosure under section 552.101 on the basis of that federal provision. Accordingly, we find that the social security number must be released to the requestor.

In summary, the OCCC must withhold the First Cash training manual under section 552.110(a) of the Government Code. Unless the information is fictitious, the OCCC must withhold the marked personal financial information under section 552.101 and common-law privacy and the marked account numbers under section 552.136. The remaining information must be released to the requestor.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.--Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be

sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at 512/475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



David R. Saldivar
Assistant Attorney General
Open Records Division

DRS/seg

Ref: ID# 163963

Enc: Submitted documents

c: Ms. Jean Ann Fox
Director of Consumer Protection
Consumer Federation of America
114 Coachman Drive
Yorktown, Virginia 23693
(w/o enclosures)

Mr. Larry Temple
Temple & Temple
400 West 15th Street, Suite 1510
Austin, Texas 78701
(w/o enclosures)